> open to scholarly pursuit. We are extremely cognizant that "[a]cademic freedom thrives not only on independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself." *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985). As a result, our Court abides by a general policy of nonintervention in purely academic matters. *See*, *Schulman v. Franklin and Marshall College*, 538 A.2d 49, 52 (Pa. Super. 1988) (*en banc*) ("A college is a unique institution which, to the degree possible, must be self-governing and the courts should not become involved in that process unless the process itself has been found to be biased, prejudicial or lacking in due process.").

Swartley, at 921.

Swartley involved a candidate for a Ph.D. in industrial engineering who was dismissed from the program after she had spent seven years on her doctoral dissertation. She brought suit for breach of contract in failing to educate her and alleged that the university acted in an arbitrary and capricious manner. As to her allegations of arbitrary and capricious acts, the Court held that it was against the general policy of the Commonwealth to second-guess academic decisions. In any review they could only determine if there was a rational basis for the academic decision:

> Having reviewed the evidence in the light most favorable to the non-moving party, we cannot find that the decision to fail appellant after her oral defense was either irrational or motivated by

> bad faith or ill will unrelated to her academic performance. Instead, it is clear to this Court that the committee members made their decisions based on purely academic reasoning – the kind that we find beyond our competence to question or challenge.

Id., at 921. Similar decisions were reached in *Eter v. College Misericordia*, 28 Pa.D.&C.3d 402 (Luzerne Cty. 1982) and in *Subbiondo v. Temple University*, 21 Pa.D.&C.3d 689 (Phila. Cty. 1981).

The material facts in this case are not in dispute: Petitioner Xi sought a judicial inquiry into matters involving academic decision-making and academic processes. Petitioner sought, in essence, an Order from the Trial Court directing the College to provide Petitioner with an explanation of the comments on written product that had already been determined to be insufficient to justify Petitioner's continued enrollment in the graduate program, and for an Order changing his grade to a passing grade. Petitioner's Second Amended Complaint, therefore, sought judicial intervention into purely academic decision-making. The Trial Court was correct to follow the general policy of this Commonwealth and decline to intervene in purely academic matters.

In order for the Trial Court, or this Honorable Court, to evaluate Petitioner's claims, it would be necessary for the Court to explore the nature of graduate studies in Social Research. As can be seen in the documents attached to Petitioner's Original Complaint, and referenced in the Second Amended Complaint, this would require an understanding of "correlational design," "sample sizes" and "multiple regression analyses," among other specialized and esoteric concepts. In order to pursue his cause of action, Petitioner would have the Trial Court explore these

concepts, delve into the rationale of the professors and examine the policies and grading procedures of the graduate program and the College. In order to address his claims that the grading process was arbitrary it would be necessary not only to understand the subject matter and course materials, but also to compare the substance of what Petitioner wrote to that of other students who were not dismissed, as well as the comments about which Petitioner complains with comments made on the written work submitted by other students who passed the requirements and who were not dismissed.

The depth of the inquiry Petitioner seeks is discernible by the allegations in the Second Amended Complaint. Petitioner alleges that Respondents Littell and Martin contradicted their lectures and the various texts utilized and relied upon when they evaluated Petitioner's written submissions. (*See*, e.g., Second Amended Complaint, Exhibit 2 to Petitioner's "Reproduction of Record", ¶¶ 8, 27, 66, 81). In order to assess whether these alleged contradictions exist, it would be necessary for the Trial Court to become familiar with the content of the professors' lecture material, and the written text and course materials, and compare those with Petitioner's written submissions and the professors' comments found therein. In order to determine if, as he alleges, Petitioner's dismissal from the graduate program was in error, it would be necessary to learn and understand the professors' criteria for satisfactory work, perform an evaluation of Petitioner's written submissions and compare them with the written submissions of all other students who received passing grades in the same course work. The results of this inquiry, then, would have to be applied to an established – and as yet unidentified – legal standard of review. It is precisely this kind of judicial second-guessing of academic decision making that is proscribed by the *Horowitz* and *Swartley* Courts.

Respondents respectfully suggest that Petitioner has produced an awkward pastiche of varied and disparate legal concepts with no discernable relevance to this Honorable Court's standard of review with respect to academic decision making. Petitioner's Second Amended Complaint avers claims based on court holdings in actions ranging from the Health Care Services Malpractice Act to insurance bad faith, from civic conspiracy to the Fair Housing Act. In fact, *each* case which is relied upon by Petitioner, and which addresses academic decisions, holds that the courts should not inquire into purely academic affairs. *See, e.g., Swartley*; *Eter*, 28 Pa. D.&C.3d at 406; *Subbiondo, supra.*

Petitioner contends that pursuant to the United States Supreme Court's holding in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 106 S. Ct. 507 (1985), the Court must inquire whether Respondents' academic decisions are "such a substantial departure from accepted academic norm as to demonstrate that person or committee responsible did not actually exercise professional judgment." The *Ewing* decision supports Respondents' position.

In *Ewing* a student enrolled in a six-year combined undergraduate/medical school program failed a written examination taken after the first four years of study, the successful completion of which was a requirement for proceeding on to the final two years of study. Ewing averred that the university's refusal to allow him to reenter the program and retake the examination deprived him of due process because such refusal was an arbitrary departure from the university's past practice.

In ruling against Petitioner the *Ewing* Court held:

> The record unmistakably demonstrates . . . that the faculty's decision was made conscientiously and

> with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Ewing, 474 U.S. at p. 225 (1985). The *Ewing* Court went on to hold that "University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." *Id.* at 225, n.11.

In the present case Petitioner's Second Amended Complaint does not aver that Professors Littell and Martin failed to exercise any professional judgment; Petitioner contends, rather, that such judgment was in error, and was not explained to Petitioner's satisfaction.

The Trial Court summarized Petitioner's claims well in the penultimate paragraph of its opinion as follows:

> We understand that Mr. Xi does not agree with the explanations provided by his professors for his failing grades. He simply refuses to accept two independent educators' appraisals of his work. This Court, however, is not equipped to "second guess" those academicians because neither Research Methodology nor Program Evaluation are within our areas of expertise. We will not

> intervene in what is clearly a purely academic decision on the part of Bryn Mawr professors. We note that the Plaintiff's pleadings lead us to the conclusion that no explanation will be sufficient enough to satisfy Mr. Xi – he simply does not believe that he deserved to fail his courses. This Court does not have the power to force the Plaintiff to understand his teachers' explanations. Nor are we able to force the Professors to re-explain in a different manner what they have already explained to Mr. Xi but which he continues to challenge.

See Trial Court opinion, "Appendix D" to Petitioner's Petition, at p.11.

There is, in the end, nothing that can be accomplished in this matter which would not run afoul of the general policy of this Commonwealth and its courts. Petitioner failed to satisfy the requirements of the graduate program; any further inquiry into his assertions of alleged arbitrariness or reckless indifference would embroil this Court in matters which touch upon the judgments of tenured professors with years of experience in these areas; the courts of this Commonwealth and this country have determined that these determinations should be given deference by the legal process.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 20 2006
OFFICE OF THE CLERK

05-1048

PASC No. 188 MAL 2005

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In the

Supreme Court
of the United States

Haiying Xi, Petitioner

v.

Bryn Mawr College et al, Respondents

On Petition For Writ of Certiorari
To The Supreme Court of Pennsylvania

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Haiying Xi
Petitioner
213 S. 45th St
Philadelphia, PA 19104
215-222-5463

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INTRODUCTION

The decision of the courts below should not be allowed to stand, because the courts below (1) selectively avoid the crucial facts under dispute and (2) incorrectly suggest that under the doctrine of academic freedom – a special concern of the First Amendment and the other federal case laws a college student does not have the right to know of the reason for the grade after a teacher assigns a grade and does not have the right to know of the correct answer from his teacher simply because the teacher's short comments claim that the student's answer is wrong.

Respondents' Brief in Opposition to the Petition for Writ of Certiorari demonstrates that the Petition should be granted not only because of Respondents' continuation to avoid the crucial facts in order to distort the issues affecting million students' basic educational rights and the foundation of education but also because of the error in the standard or ambiguity surrounding the standard regarding whether a college teacher's range of discretion for academic decision can be extended to suppress a student's educational right to review a teacher's reason for the grade and to request a teacher to provide a correct answer under the doctrine of academic freedom and the other federal case laws such as *Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 95 S. Ct 948 (1978) and Regents of the University of Michigan v. Ewing, 747 U.S. 214, 106 S. Ct. 507 91985).* This Court should correct the error or clarify the standard.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD CLARIFY IF COLLEGE FACULTY'S RANGE OF

DISCRETION FOR ACADEMIC DECISION CAN BE EXTENDED TO SUPRESS STUDENTS' RIGHT FOR KNOWLEDGE

For the instant case, one of the fundamental issues under dispute is whether Petitioner's request for Mr. Martin and Ms. Littell to clarify their short comments on Petitioner's test/papers and to provide the correct answers constitutes a college student's basic educational right for knowledge or an invade of college faculty's academic decision.

To clarify the issue, Petitioner has to present two sample questions that Petitioner raised after reading Mr. Martin and Ms. Littell's comments.

Mr. Martin taught Program Evaluation. According to Mr. Martin, one of the core requirements for this course was to understand that in order to evaluate the effect of a program people should compare its outcome with the outcome either from previous test or from an equivalent group not affected by the program. Therefore, when Petitioner found that an author claimed that an employment program worked well for a particular group without presenting previous data or the outcomes from an equivalent group not affected by the program, following Mr. Martin's instruction, Petitioner points out that such a conclusion could not be reached. Mr. Martin held that Petitioner misunderstood the core concept because to him "these outcomes seem pretty clear." (Exhibit 1-B attachment)

To understand Mr. Martin's comment and how he reached his conclusion, Petitioner asked him, "Do we know about the employment outcome for non-offenders prior to the program or do we need not to know of it before we make such a clam?" Without any information, "based on what standard, these outcomes are clear?" Mr. Martin does not dispute that

Petitioner's question is about the core content of his course and is the core knowledge that he must deliver for his class. Later, Petitioner presented the exact citation from the textbook that Mr. Martin used for the class for him to review.

Ms. Littell taught Research Methodology. One of the core contents for her course is the methods of sampling. When explaining the concept of systematic sampling, Petitioner cited an example of room numbering system for an apartment building from the textbook. Ms. Littell held that Petitioner misunderstood the basic concept because according to her it was an example of the cluster sampling rather than of the systematic sampling. She wrote a two- word comment "cluster sampling." After reading her comment, Petitioner presented the textbook for her to review. The textbook exactly specifies that this is an example of systematic sampling. Petitioner asked Ms. Littell to clarify the conflict between her two- word comment and the textbook.

Both Mr. Martin and Ms. Littell refused to clarify their comments and refused to tell Petitioner what correct answers should be.

For the above two examples, Mr. Martin and Ms. Littell do not dispute that they are two college teachers and Petitioner was a college student. They do not dispute that they failed Petitioner's test/papers because Petitioner misunderstood the basic academic concepts. They do not dispute that Petitioners' questions about their comments on Petitioner's test/papers are the core contents for their courses and the basic knowledge that Petitioner as a student must grasp and they as teachers must deliver. They do not dispute that their comments did not offer any information regarding what correct answers should be. They do not dispute that Petitioner presented the

correct citations from the textbooks for them to review. They do not dispute that the textbooks presented by Petitioner are true. They do not argue until this point that the citations from the textbooks directly conflict with their comments but correspond to Petitioner's answers.

What do they argue? They argue that it will violate the doctrine of academic freedom and a series of the federal case laws such as *Regents of the University of Michigan v. Ewing, 474 U.S. 214, 106 S. Ct 507 (1985)* if they tell Petitioner what correct answers should be and clarify their comments with Plaintiff according to their range of discretion.[1] In other words, they argue that it is the general policy under the US laws a college teacher should not tell students what correct answer should be even though this is a basic academic knowledge that a teacher is supposed to deliver as long as this teacher's short comment holds that this student misunderstands a basic academic concept!

Petitioner argues that a student has the right to ask his teacher to clarify his comments, to provide a correct answer, and to deliver the knowledge that a student should grasp. No student can learn anything from Mr. Martin's comment "these outcomes seem pretty clear" since the academic standard and his teaching obligation requires him to teach how the outcomes became clear to him when he had neither previous data nor an equivalent group to compare. As teachers, Respondents are obligated to explain. Petitioner strongly believes that the doctrine of academic freedom and the federal laws protect students' right in this aspect.[2]

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[1] Respondents' Brief In Opposition, page 11, 3rd paragraph.

[2] Most federal case laws recognize that students received plenty of explanation s before being dismissed. For example, in *Board of Curators of the University of Missouri v. Horowitz 435 U.S.*

The courts below sided with Respondents' argument. The trial court held that by writing a comment such as "outcomes seem pretty clear", and by refusing to tell if the textbook is wrong by mixing up a systematic example with a cluster example, Mr. Martin and Ms. Littell had already explained what correct answers should be. If Petitioner wanted to find how the outcome became clear to Mr. Martin when he had neither previous data nor an equivalent group to compare the outcomes, or why Ms. Littell's example of cluster sampling is opposite to the one in the textbook, Petitioner "continues to challenge" and "no explanation will be sufficient enough to satisfy Mr. Xi."[3] because "University faculty must have the widest range of discretion in making judgment as to the academic performance of students and their entitlement to promotion or graduation." *Regent of the University of Michigan v. Ewing, 474 U.S. at p.225 (1985).* [4] Thus, university faculty's widest discretion can be extended to suppress a student's request for a correct answer about a basic academic concept that a teacher is obligated to deliver as long as the teacher can declare that the outcomes seem pretty clear to him. Any further request shall damage academic freedom from thriving; therefore, shall be prohibited by the laws.

The conflict in application of the doctrine of academic freedom and the above federal and state

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*78, *93, 98, S. Ct. 948, 957 (1978)* Student had numerous meetings with and received letters from advisor, committee and dean. In *Regents of the University of Michigan v. Ewing, 474 U.S. 214, *216, 106 S. Ct 507, **509,* In response to a written request from student, the Board allowed student to appear personally and to explain why he believed that the score did not reflect his academic potential.

[3] The trial court's opinion, page 18, paragraph 1

[4] The trial court's opinion, page 17, paragraph 2

case laws for the instant case indicates ambiguity between students' right for knowledge, university faculty's obligation to deliver knowledge, and college faculty's range of discretion as to academic decision. The previous federal case laws contain flaws because they do not provide any guideline regarding whether a college student has the right to ask a faculty member to clarify the comments on a student's works when the comments cause a great deal of confusion; whether this kind of request from a student may invade a faculty member's range of discretion as to judgment of students' academic performance protected by the doctrine of academic freedom- a special concern of the First Amendment; and whether a college student's right to make such a request should be excluded from the protection of the same doctrine of academic freedom. This case now gives the Court the opportunity to articulate clear the guideline for the issue that will affect thousands of college students and their families' basic educational right.

II. THE ISSUES HIDED BY THE COURTS BELOW AND RESPONDENTS AFFET ALL COLLEGE STUDENTS AND THEIR FAMILIES' RIGHT IN THIS COUNTRY

In the Pleading, Petitioner has averred several issues that affect the interest to all college students and their families and the future of academic freedom in this country. However, all these issues have been purposely omitted by the trial court when it summarized Petitioner's operative pleading. [5] One of

[5] If this Petition is granted, Petitioner will go over every single paragraph of the Operative Pleading summarized by the trial court and to point out what facts have been omitted by the trial court and how.

the issues is whether Petitioner as a student has the right to know of his teacher's reason for the grade. The fact underlying the issue is that after Ms. Needleman, a teacher, assigned Petitioner's final paper a very low grade which disqualifies Petitioner's enrollment in the program, Ms. Needleman refused to return the final paper with her comments to Petitioner even though Petitioner had made four formal written requests. As a result, Petitioner had no idea for what reason Petitioner's paper received such a low grade. Petitioner averred this issue in the pleading. Respondents denied that the school's policy requires a teacher to return the paper to a student in the Response. However, after Petitioner presented the school's policy to demonstrate that Respondents' answer was false, both the trial court and Respondents deliberately avoided mentioning this issue again.

We all understand and agree that a student's right to review the finished assignment with a teacher's input is an integrated part of the educational process in this country. Students will not be able to grasp any knowledge if they are prohibited from reviewing their assignments with their teacher's input except for a grade. However, this unbelievable situation happened to Petitioner.

When a court reviews a case like this, the curt must answer two important questions answers. First, if Petitioner was only person in the category receiving such maltreatment under the similar situation, and second, what may happen if the same treatment is expanded to everyone in the same category. The first question is a test for discrimination and the second question is a test for the interest to the general public. Here, a court's answers to both questions must be consistent and must have no contradiction. In other words, if this

Court allows a special treatment for one individual, this Court must allow the same treatment to every individual in the same category.

Now the issue before this Court is if every college student is prohibited from reviewing his teacher's reasons for the grade and from access to his finished assignment, will this kind of educational policy or practice help college students to grasp the knowledge and skills, improve educational quality in the US campus and promote academic freedom in this country? As the consumers for college education, should college students and their families still pay thousands of dollars for their tuitions when they are even not allowed to know what correct answers should be from their teachers? If the Court can not reach a positive conclusion, then, a reverse of the trial court's decision is the only option for this Court to make. This case provides this Court the opportunity to clarify this issue that affects every college student and their families.

III. NO ISSUE REQUIRES THIS COURT TO SECOND GUESS

The last resort that Respondents claim in their Brief is that the Court is not the place to second guess academic decisions and that the court's review will make it necessary for the court to "become familiar with the contents of the professors' lecture material..." [6] Respondents' arguments have no factual ground.

Respondents distorted the facts and issues. The case records clearly demonstrate that after Petitioner found that Ms. Needleman refused to

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[6] Respondents' Brief In Opposition, from the last paragraph of page 10 to page 11.

return the final paper with her comments and Mr. Martin and Ms. Littell refused to clarify their comments but lied that they did, Petitioner reported the incidents to the school authorities: the Committee of Doctoral Program, Dean of the School and President of the College. Petitioner submitted Mr. Martin and Ms. Littell's short comments along with the correct citations from the textbooks for these authorities to review.

Respondents do not deny that the Committee of Doctoral Program is the academic authority with the full academic capacity to review every academic issue. Respondents also do not deny that Dean of the School and President of the College have supervisory responsibility for their faculty members.

However, following Respondents' logic, this Court may need to declare that this Court is not able to second guess should a college teacher tell a student of the reason for the grade; should a college student have the right to ask his teachers to clarify their comments; whether Mr. Martin really answered Petitioner's questions after he sent his e-mail to Petitioner on 6/11/2001;[7] should the Committee of Doctoral Program take action after receiving Petitioner's report according to the school policy; should Dean of the School and President of the College find for what reason Ms. Needleman refused

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[7] Exhibit 1-C. Please note that although now Mr. Martin argues his short comments fully answered Petitioner's questions about his comments, his e-mail didn't say that he had already answered Petitioner's questions and therefore it would not be necessary to re-explain them as the trial court held. Instead, he recognized Petitioner's questions and wanted to meet Petitioner in person (secretly?) to discuss them. This Court simply needs to ask if such a meeting took place as Mr. Martin told Dean of the School and President of the College. If yes, when, where and how. Furthermore, what questions did he explain to Petitioner? This Court does not need to second guess this issue.